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No. 79-1063

In the Supreme Court of the United States

OCTOBER TERM, 1979

STEPHEN FRANCIS KEEFE AND FRANCIS JOSEPH MOORE, III, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioners contend (Pet. 5-6) that their contempt citations for refusing to answer grand jury questions violate the Fifth Amendment privilege against compulsory self-incrimination because their answer under a grant of use immunity could incriminate them in hypothetical foreign prosecutions.

1. In June 1979, petitioners were indicted in the United States District Court for the District of New Hampshire on three counts of violating the federal drug laws. These charges arose out of petitioners' unloading of a large quantity of marijuana from a small vessel (the "Two Jims") at the New Hampshire Port Authority Pier in Portsmouth, New Hampshire. On August 28 and 29, 1979, after trial had commenced, they pleaded guilty to

possessing marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1). Petitioners thereafter moved to withdraw their guilty pleas. On October 4, 1979, the district court denied this motion, and petitioners' appeal from this order is currently pending before the court of appeals (Pet. App. 3a).[1]

Subsequent to their pleas of guilty, petitioners were subpoenaed to appear before a grand jury investigating the unlawful distribution of marijuana in New Hampshire (Pet. App. 3a). On the government's motion pursuant to 18 U.S.C. 6001 *et seq.*, the court issued an order granting petitioners immunity and compelling them to testify (Pet. App. 3a-4a, 8a). Petitioners moved to quash their subpoenas, claiming that the statutory grant of immunity did not adequately protect them from the possibility of future incrimination. In particular, petitioners suggested that their grand jury testimony might be used in a foreign criminal prosecution or at a subsequent federal trial, if the court of appeals should allow them to withdraw their guilty pleas. Petitioners did not, however, assert that they had been in, or violated the law of, any foreign jurisdiction, or that any foreign jurisdiction was planning to prosecute them. In addition, the government informed the court that it had not received any request from any jurisdiction, foreign or domestic, regarding the use of petitioners' grand jury testimony and that in any event, under Fed. R. Crim. P. 6, the government "would not consider complying with such requests" (Affidavit of Assistant U.S. Attorney Robert T. Kennedy para. 3 (Nov. 2, 1979)).

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[1]On October 9, 1979, the district court sentenced petitioner Keefe to four years' imprisonment and a special parole term of five years, and petitioner Moore to five years' imprisonment, which was suspended in favor of five years' probation, a $5,000 fine, and two years' special parole.

On November 9, 1979, the district court denied petitioners' motion to quash the subpoenas (Pet. App. 3a-9a). The court first noted that petitioners' grand jury testimony could not be used against them in any state or federal trial and that, if they succeeded in their effort to withdraw their pleas, the government would have the burden of demonstrating that any evidence used at a subsequent trial was not derived from or tainted by petitioners' compelled testimony (Pet. App. 4a-6a). The court further concluded that, regardless of whether Fed. R. Crim. P. 6(e) is an effective protection against the risk of foreign criminal liability based on compelled grand jury testimony, petitioner had failed "to particularize any real or substantial danger of foreign prosecution" (Pet. App. 7a).

Thereafter, on November 15, 1979, petitioners appeared separately before the grand jury. Each was advised of the order compelling his testimony under a grant of use immunity. Each claimed the privilege against compulsory self-incrimination and refused to answer questions regarding the identity of other persons who were involved in unloading marijuana from the "Two Jims" (Pet. App. 26a-27a). After a hearing, the court held petitioners in contempt and ordered them to be imprisoned for the duration of the grand jury or until they purged themselves of the contempt. The court of appeals summarily affirmed (Pet. App. 1a-2a).

2. Petitioners primarily contend (Pet. 5-6) that the grant of use and derivative use immunity is insufficient to protect them from the possible use of their testimony in a

criminal prosecution in a foreign jurisdiction.[2] But in *Zicarelli* v. *New Jersey*, 406 U.S. 472, 478 (1972), this Court held that the privilege against compulsory self-incrimination "protects against real dangers, not remote and speculative possibilities." Accordingly, the Court concluded that, even if the risk of foreign prosecution might in some instances implicate a witness's Fifth Amendment rights,[3] the witness in that case could be compelled to answer questions because he did not have "a real and substantial fear of foreign prosecution." *Ibid.* *Zicarelli* is controlling here, since, as both courts below found, petitioners have failed "to particularize any real or substantial danger of foreign prosecution" (Pet. App. 7a, 2a).

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[2]Question three of petitioners' questions presented suggests (Pet. 3) that petitioners cannot be compelled to testify so long as their appeal concerning their guilty pleas is pending. Petitioners do not argue this point in the body of the petition, however, and it is well settled that the statutory grant of immunity would fully protect petitioners in the event of such a trial. See, *e.g.*, *Kastigar* v. *United States*, 406 U.S. 441, 459-462 (1972); *In re Liddy*, 506 F. 2d 1293 (D.C. Cir. 1974).

[3]Several courts of appeals have concluded that a witness who claims a substantial possibility of foreign prosecution may nevertheless be compelled to testify before the grand jury, because of the protection afforded by Fed. R. Crim. P. 6(e). See, *e.g.*, *In re Federal Grand Jury Witness*, 597 F. 2d 1166, 1167 (9th Cir. 1979); *In re Grand Jury Proceedings*, 559 F. 2d 234, 236-237 (5th Cir. 1977), cert. denied, 434 U.S. 1062 (1978); *In re Parker*, 411 F. 2d 1067 (10th Cir. 1969), vacated as moot, 397 U.S. 96 (1970). Contrary to petitioners' suggestion (Pet. 5-6), there is no conflict among the courts of appeals on this point. Moreover, that issue is not in any event fairly presented by this case, since petitioners have not demonstrated a real and substantial threat of foreign prosecution.

Petitioners' claim of a substantial possibility of foreign prosecution rests solely on the prosecutor's comment at sentencing regarding petitioners' involvement in a marijuana scheme originating in Colombia (Pet. App. 28a).[4] The prosecutor did not suggest that petitioners were responsible for the large shipments of marijuana from Colombia, however. Indeed, petitioners have not asserted that they were ever in Colombia, much less that they may have violated Colombian law. Compare *Zicarelli*, *supra*, 406 U.S. at 478-479. In light of the nearly universal principle that criminal laws are not given extra-territorial effect, there is thus little possibility that Colombia would or could prosecute petitioners. *In re Quinn*, 525 F. 2d 222, 223 (1st Cir. 1975); *United States* v. *Doe*, 361 F. Supp. 226, 227 (E.D. Pa.), aff'd, 485 F. 2d 678 (3d Cir. 1973), cert. denied, 415 U.S. 989 (1974); see also note 3, *supra*. Moreover, petitioners have "totally failed to demonstrate that the [Colombian] authorities have any interest whatsoever in their prosecution" (*United States* v. *Yanagita*, 552 F. 2d 940, 947 (2d Cir. 1977)), and the government is unaware of any facts to the contrary. Finally, the grand jury questions that petitioners refused to answer concerned only petitioners' activities here in America—matters that do not give rise to a substantial fear of foreign prosecution. See *Zicarelli*, *supra*, 406 U.S. at 479-480; *United States* v. *Yanagita*, *supra*, 552 F. 2d at 946-947; *In re Quinn*, *supra*; *United States* v. *Doe*, *supra*.

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[4]Counsel for the government informed the court that petitioners had been caught unloading marijuana from their small boat and that such smaller vessels were used to off-load larger ocean-going vessels that were engaged in bringing large quantities of marijuana to this country from Colombia.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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